

★ **MAY 18 2012** ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
TONY DUNBAR,

Petitioner,

-v-

T. GRIFFIN, Superintendent,

Respondent.

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AMON, Chief United States District Judge:

BROOKLYN OFFICE

NOT FOR PUBLICATION
MEMORANDUM & ORDER
11-CV-5858 (CBA)

Petitioner Tony Dunbar, pro se, filed this federal habeas petition on November 25, 2011. On February 8, 2012, the Court granted Dunbar's request for a stay of his federal habeas proceedings so that he could exhaust his claim for ineffective assistance of appellate counsel in state court through an application for a writ of error coram nobis ("February 8 Order"). (DE#7.) The Court withdrew the Order to Show Cause that previously had been issued on December 12, 2011, and directed the Clerk of the Court to administratively close the case until such time as the petitioner moves to amend his habeas petition following a final state court decision on his ineffective assistance of counsel claim.

The Court received a letter from the petitioner dated April 23, 2012, the contents of which suggest that the petitioner did not receive a copy of the Court's February 8 Order.¹ (DE#8.) The petitioner notes in his letter that the government never responded to the Court's December 12, 2011, Order to Show Cause and asks the Court how he should proceed. This concern is unfounded, as the Court withdrew the Order to Show Cause in its February 8 Order, another copy of which shall be mailed to the petitioner with this order.

The petitioner also submits with his letter an amended motion for a stay of federal habeas proceedings. (DE#9.) The petitioner seeks to broaden the scope of the Court's stay of his federal habeas proceedings so that he can exhaust additional claims in state court through a post-

¹ The docket indicates that the Court's February 8 Order was mailed to petitioner at the Southport Correctional Facility in Pine City, New York. The petitioner should inform the Court if he is not receiving his mail at the facility.

judgment collateral motion pursuant to N.Y. CPL § 440.10. The petitioner argues that there is good cause for a further stay of proceedings because he has been attempting since September 8, 2011, to obtain favorable “newly-discovered” evidence in support of his § 440.10 motion, first through a direct request to the state court, (DE #9, Exh. A.), and then through a Freedom of Information Law (FOIL) request to the Kings County District Attorney’s Office. On April 16, 2012, the District Attorney’s Office informed the petitioner that he should expect to receive a response to his FOIL request on approximately October 19, 2012. (DE#9, Exh. C.)

The petitioner’s amended motion for a stay is granted. The petitioner’s federal habeas proceedings shall be stayed pending the complete exhaustion of the petitioner’s state law claims. This stay is conditioned on the petitioner filing his N.Y. CPL § 441.10 motion within thirty (30) days of his receipt of the District Attorney’s response to his FOIL request. See Zarvela v. Artuz, 254 F.3d 374, 381 (2d Cir. 2001) (explaining that a district court that elects to stay a petition pending the exhaustion of state law claims “should explicitly condition the stay on the prisoner’s pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed”). The petitioner shall return to this Court and file an amended habeas petition within thirty (30) days of a final state court decision on his § 441.10 motion. The petitioner is warned that if he fails to file an amended habeas petition within thirty (30) days of a final state court decision on his § 441.10 motion, the stay will be vacated and he may well find himself time-barred from resubmitting his claim in a federal habeas corpus petition.

SO ORDERED.

Dated: Brooklyn, New York
May 18, 2012

/S/

Carol Bagley Amor
United States District Judge